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Book Review. Legitimacy and History: Self-Government in American Constitutional Theory

Daniel O. Conkle
Indiana University Maurer School of Law, conkle@indiana.edu

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LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY. By Paul W. Kahn.[1] New Haven & London: Yale University Press. 1992. Pp. xi, 260. $27.50.

Daniel O. Conkle[2]

For those who grimace at the thought of another book about constitutional theory, think again. In *Legitimacy and History*, Professor Paul W. Kahn offers a fascinating and richly nuanced intellectual history and critique of American constitutional theory. This is an outstanding book. It contains original and important insights not only about historical developments, but also about the predicament of contemporary constitutional thought.

The task of constitutional theory is to reconcile the concept of self-government with the existence of constitutional limitations on the exercise of political power. To accomplish this task, according to Kahn, a theory of constitutional government must address the passage of time since the adoption of the Constitution. Thus, in the hands of Kahn, what Alexander Bickel called the "counter-majoritarian difficulty"[3] becomes "the problem of temporality." Why should the self-governing present be bound by the constitutional enactments of the past? To answer this question, Kahn writes, one must appeal to the political self-identification of citizens. More precisely, one must link citizens to the Constitution in such a way that they regard the Constitution, however dated its enactment, as somehow a product of their own self-government. Relatedly, one must address the relative roles of "reason" (political "science" or truth) and "will" (democratic

1. Professor of Law, Yale Law School.

2. Professor of Law and Charles L. Whistler Faculty Fellow, Indiana University at Bloomington.

3. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16-23 (Bobbs-Merrill, 1962).

consent or legitimacy) in one's understanding of constitutional government.

The problem of temporality varies in complexion during different historical periods, and so gives rise to different theoretical responses. Kahn divides the history of American constitutional theory into four major periods, each of them dominated by a particular conceptual model. A model of "making" dominated the founding period, but by the middle of the nineteenth century, this model had been replaced by one of "organic maintenance." Thereafter, there arose a model of constitutional "growth" or "evolution," which served to justify both the *Lochner* era[4] and, ironically, *Lochner*'s demise. Finally, in the contemporary period, Kahn claims that the model of growth has given way to a model of "community," which attempts to ground constitutional government in a community of discourse.

Not surprisingly, temporality was not a problem under the "making" model of the founding period. During this period, the Constitution was regarded as an object to be formed by the people, acting as political artisans schooled in the science of politics. The self-governing acts by which the Constitution was created thus served to synthesize the reason of political science with the will of democratic consent. At least in theory, this synthesis of reason and will extended to the entire nation, so citizens could properly regard the Constitution as a product of their own self-government. Interestingly, as Kahn observes, the model of making continued to dominate during the post-ratification period and, in particular, in the jurisprudence of Chief Justice John Marshall. Thus, in cases such as *Marbury v. Madison*[5] and *McCulloch v. Maryland*,[6] Marshall first defended his major constitutional conclusions as a matter of basic reason or scientific deduction, and only then did he turn for additional support to the actual language of the Constitution. By proceeding in this fashion, Marshall perpetuated the synthesis of reason and will, suggesting that the scientific truths of constitutional government were linked to and legitimated by the positive text that the people had enacted.

As America moved toward the middle of the nineteenth century and, relatedly, toward the Civil War, faith in the science of politics declined. With the passage of time, moreover, no longer could the Constitution be viewed as an act of contempo-

4. See *Lochner v. New York*, 198 U.S. 45 (1905).
5. 5 U.S. (1 Cranch) 137 (1803).
6. 17 U.S. (4 Wheat.) 316 (1819).

rary self-government. To cope with the problem of temporality, constitutional theory progressed from the model of making to a model of "organic maintenance." Under this model, the state was understood as a living organism constituted by the people. This organism had taken on life at the founding; now, it was to be maintained and preserved. Citizens could embrace the Constitution as an act of their own self-government through an intertemporal identification with the Founders. Indeed, citizens were at one with the Founders, part of the same organic unit, and the Founders' Constitution became an object of almost sacred reverence. Reason and will no longer converged. Instead, the will of the Founders was paramount. Constitutional interpretation therefore was properly based not on science, but rather on history, and originalism became the central interpretive principle.

Under this model, there was broad agreement that the Founders' Constitution should be honored and conserved. At the same time, however, there was radical disagreement concerning the meaning of the Constitution and its bearing on the national crisis that became the Civil War. "Everyone agreed that they were the children of the founding fathers, but they did not agree on the meaning of the familial obligation." Thus, thinkers as diverse as Joseph Story, John Calhoun, Roger Taney, Abraham Lincoln, and Stephen Douglas, each in his own way, could embrace the maintenance model of constitutional government even as they vigorously debated its implications.

In *Dred Scott v. Sandford*,[7] for example, Chief Justice Taney relied on the Constitution's "true intent and meaning when it was adopted"[8] in ruling that Blacks could not become citizens of the United States and that the Missouri Compromise was unconstitutional. For Taney, citizens' intertemporal identification with the Founders depended on the maintenance of intergenerational bloodlines, bloodlines that were racially distinct. Blacks, quite simply, were not part of the American constitutional organism. For Lincoln, by contrast, the inheritance from the Founders was moral, not biological, and to identify with the Founders was to identify with a vision of liberty and equality. Citizens' intertemporal link to the Founders took on a religious dimension, with citizens transcending their individual finitude by becoming part of the Founders' project, even to the point of "[giving] their lives

7. 60 U.S. (19 How.) 393 (1856).
8. Id. at 405.

that [the] nation might live,"[9] this in penance for the corporate sin of slavery.[10]

The model of organic maintenance continued to dominate in the immediate aftermath of the Civil War. The Fourteenth Amendment, for example, was defended not as a constitutional innovation, but rather as a return to the Founders' vision. At the same time, however, the underpinnings of the maintenance model were weakening. As each decade passed, it became more and more difficult to justify an intertemporal identification with the Founders, and the idea of progress suggested that the will of the Founders might be little more than the dead hand of the past. Reason returned to constitutional theory under a new model, that of "growth" or "evolution." Unlike the abstract political science of the founding period, however, reason now was the product of rational experience, with the Constitution understood to be evolving toward a comprehensively rational constitutional order. The nation remained a historically continuous political community, and history remained an important component in the "science" of constitutional governance, but the founding lost its special significance.

As with the earlier model of maintenance, agreement on the model of evolution did not mean agreement on its substantive implications. Likewise, it did not mean agreement on the proper locus of constitutional growth. For some, the proper locus was the courts; for others, the popular branches.

The model of constitutional evolution emerged first in theoretical writings and only later in the courts. Among the theoretical writings that Kahn discusses are the works of Sidney George Fisher, Thomas Cooley, Christopher Tiedeman, Francis Wharton, James Thayer, and Woodrow Wilson. In the courts, the model of evolution developed gradually in the decades following the Civil War, taking full form in the Supreme Court's 1905 decision in *Lochner v. New York*.[11]

The "progressive science" of the *Lochner* era[12] was guided by the experience of the common law, adapted to current conditions, and by the "common understandings" of the day,[13] which

9. Abraham Lincoln, *Address Delivered at the Dedication of the Cemetery at Gettysburg, November 19, 1863*, in Roy P. Basler, ed., *Abraham Lincoln: His Speeches and Writings* 734 (World Publishing Co., 1946).

10. See Abraham Lincoln, *Second Inaugural Address, March 4, 1865*, in Basler, ed., *Abraham Lincoln: His Speeches and Writings* at 792 (cited in note 9).

11. 198 U.S. 45 (1905).

12. See *Holden v. Hardy*, 169 U.S. 366, 385 (1898).

13. See *Lochner*, 198 U.S. at 59.

included a commitment to laissez faire. This notion of "scientific" governance by the judiciary, however, proved to be unstable. Legal realism provided a general critique of judicial rationality. Even more telling was the rise of empirical science, which questioned the reliability of the common law, displaced "common understandings," and undermined the philosophy of the free market as an ending point for constitutional government. Given its changing character, the science of government was no longer within the competence of the courts, but instead was better suited for legislative or administrative inquiry. The model of evolution remained in place, along with its commitment to reason, as reflected in "the best science" of the day. Thus, according to Kahn, the constitutional crisis of the 1930s did not involve a conceptual revolution. But with the fall of *Lochner*, the locus of "the best science," and therefore the locus of constitutional evolution, had shifted from the courts to the popular branches.

In the wake of the 1930s, however, the lesson of *Lochner* and its demise was reconceived. In hindsight, the constitutional shift of the 1930s was viewed not as a product of changing science, but rather as a victory for majoritarian rule. In accordance with this new understanding, the judicial protection of individual rights now gave rise to the "countermajoritarian difficulty." Relatedly, the question for modern constitutional theory became a new question of proper locus, this time the proper locus of will or consent. The model of evolution had addressed the problem of temporality by appealing to a sense of reason that would resonate in the present, permitting citizens to identify with the Constitution as a product of their own generation. But the evolution model had focused on reason at the expense of will. It had suggested that the Constitution was to embody the will of the present, but it did not resolve the question of where that will should properly reside. Should it rest in the autonomy of each individual citizen or in the political community as a whole, acting through the popular branches? The debate between autonomy and majoritarian rule thus became the central issue of modern constitutional theory.

Like earlier debates, this one has included both academic commentary and judicial decision making. Kahn discusses and criticizes the writings of Learned Hand, Herbert Wechsler, Alexander Bickel, and John Ely, among others, and he also considers a variety of modern decisions in which the Supreme Court has embraced individual autonomy as a touchstone of constitutional law. He examines not only the "privacy" decisions culminating

in *Roe v. Wade*,[14] but also a range of other cases that, according to Kahn, can be understood to protect autonomy. In Kahn's view, for example, the Court's equal protection doctrine rejects historical categories in favor of individual self-definition through the exercise of autonomy. In striking contrast to the citizen of the nineteenth century's organic maintenance model, the autonomous citizen of the modern period is not part of an organic unit. Rather, each citizen is a self-made individual who belongs to no one else.

The judicial protection of autonomy remains controversial, of course, and another strand of modern constitutional theory argues in favor of majoritarian rule. But the theories of autonomy and majoritarian rule both promote the primacy of will over reason. Both reject, either explicitly or implicitly, the notion that substantive values can be tested against the standards of reason. Instead, such values are simply a matter of subjective preference, whether that of the autonomous individual or that of the governing majority.

The claims of the autonomous individual and of the governing majority have no logical stopping points, and they create the dilemma that recently has given rise to the fourth model of constitutional theory. Like the model of evolution, the model of "community," at least in many of its variants, addresses the problem of temporality by linking the Constitution directly to the present. More distinctively, this model attempts to resolve the dilemma of will through a conceptual device that connects the autonomous individual to the majority. This device is the community of discourse.

Unlike the previous three models, the model of community is an academic product that has had little influence in the courts. As a result, Kahn devotes his discussion to the academic literature, which consists of two related schools of thought: the new republicanism of such writers as Bruce Ackerman, Frank Michelman, and Cass Sunstein; and the "interpretivism" (broadly defined) of such theorists as Owen Fiss, Robert Cover, and Ronald Dworkin. Although their theories differ in many respects, these various republican and interpretive thinkers all embrace the concept of a community of discourse. Accordingly, each theorist defines the particular sort of discursive community he has in mind, including its institutional as well as its temporal location.

14. 410 U.S. 113 (1973).

Despite their best efforts, these community theorists cannot resolve the dilemma of will. Discourse can involve the exercise of "positive freedom," a process by which the individual and the community engage in a mutual creation of meaning. Through this process, individual autonomy merges with the community's definition of value, and the dilemma of will disappears. The model of community thus can create an identity between individuals and the constitutional order of which they are a part. As Kahn explains, however, no community of discourse includes all (or even most) citizens, and those who are excluded are not engaged in the exercise of positive freedom. To the contrary, for these (most) citizens, the coercion of the constitutional order works to frustrate their freedom, in the sense of individual autonomy, and the dilemma of will remains unresolved. Even if the judiciary, the legislature, or some other interpretive institution can be viewed as "a self-generative, dialogic community, [this] has nothing to do with the authority the institution exercises over the rest of the political community." Kahn thus agrees with Robert Cover that the constitutional order is less the product of a community of discourse than an attempt to silence the many competing voices in our society.

Kahn believes that the sequential development of the four models of constitutional theory has been a matter of logical progression. Under the making model, there was a synthesis of reason and will. With the passage of time, however, new theories were required to justify the constitutional order for generations farther and farther removed from the founding. The synthesis of reason and will disappeared. Under the model of maintenance, constitutional theory emphasized will to the exclusion of reason. Later, the model of evolution reversed this preference, de-emphasizing will and focusing instead on the importance of reason.

The model of community attempts to regain the synthesis, bringing constitutional theory full circle. Under the community model, citizens are to create their own sense of meaning—their own sense of reason—through an act of will, the act of communitarian discourse. For Kahn, this model represents "the end of constitutional theory." But, as Kahn explains, this final model of constitutional theory cannot resolve the dilemma of will and therefore cannot justify the constitutional order. Indeed, because the model of discursive community is inconsistent with every assertion of authority outside the discourse, Kahn argues that it is ultimately subversive of the constitutional order. More generally, Kahn concludes that the problem of constitutional the-

ory simply cannot be resolved: "Under the conditions of temporality within which any state exists, self-government is not possible."

Nowhere have I encountered a more engaging book about constitutional theory. Kahn brings a wealth of historical resources to bear, and he offers a probing analytical critique of the materials that he confronts. His description of recent works of constitutional theory is lucid, sometimes more so than the originals. He cuts to the heart of each theoretical effort and deftly exposes its primary weaknesses. Likewise, Kahn makes a number of insightful observations concerning the judicial decisions that he discusses. What is more, he ties his book together with an original and provocative explanation of the historical progression of constitutional thought.

This book is not without shortcomings. Although Kahn discusses earlier judicial decisions, often at length, he has very little to say about recent trends in the Supreme Court. As Kahn notes, the Court has been largely unaffected by the work of contemporary academics, but surely the Court's decisions in the 1980s and 1990s have their own implications for the path of constitutional theory.

Further, Kahn's argument of logical progression is subject to challenge. Kahn makes a convincing case for the development of each of the models that he discusses, but as he concedes, the older models have never been purged from constitutional theory. Instead, they remain available as sources of justification for constitutional decision makers such as the Supreme Court. Kahn gives some attention to the continuing influence of these older models, but he might have done more in this respect. Even today, for example, the maintenance model exerts a considerable pull, perhaps in part for reasons that can be traced to the making model. In particular, we may respect the will of the Founders not simply for its own sake, but rather because we actually trust the Founders' wisdom, the sense of reason or political "science" that their will reflects. Likewise, the model of growth remains a powerful force in contemporary constitutional theory. Not everyone, and certainly not the Supreme Court, has fallen prey to "the communitarian virus sweeping constitutional theory." Outside the academy, at least, it seems that the dominant models of constitutional theory continue to be those of organic maintenance and growth, not communitarian discourse.

Kahn is right in suggesting that the predicament of contemporary constitutional theory is tied to the contest between autonomy and majoritarian rule, and that this contest in turn is linked

to the increasingly prevalent belief that normative moral judgments are matters simply of personal preference. The problem of moral skepticism, however, runs deep and wide in American culture; it is hardly unique to constitutional theory. For us to move beyond the impasse of contemporary constitutional theory, we must confront the moral predicament of American society in general. We must address the existence and meaning of moral truth in the radically pluralistic, and increasingly polarized, society in which we live. A daunting challenge, to say the least.

THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE.

By Howard Gillman.[1] Durham, N.C.: Duke University Press. 1993. Pp. x, 317. $29.95.

Herbert Hovenkamp[2]

Gillman's book is another in a long and growing list of titles written in the 1980s and early 1990s designed to illuminate the *Lochner* era in Supreme Court jurisprudence. Gillman is interested mainly in antecedents, beginning with the Founders and focusing heavily on the Jackson period. Like most good recent writing on this subject, Gillman eschews the use of legal "formalism" as an explanatory paradigm. That notion, that the judges were rule-bound lawyers who separated law from policy, explains little and is, in any event, wrong. Substantive due process was driven by policy concerns just as much as landmark twentieth-century decisions such as *Brown v. Board of Education* or *Roe v. Wade*, and the judges who espoused it were a highly creative and energetic group.

Gillman argues that although substantive due process was formalized in American constitutional thought in the 1880s and after, its presence is detectable much earlier than historians have generally realized. Indeed, one can find it as early as the late eighteenth century, and it becomes quite visible already in the second decade of the nineteenth century. As he notes, the great revolution in ideas of free trade that facilitated the rise of the Jacksonian movement and an incipient national market created a corresponding hostility toward parochial state and local regulations that tended to favor hometown businesses at the expense of

1. Assistant Professor of Political Science, University of Southern California.
2. Willie Professor of Law, University of Iowa.